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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSUE VARGAS MORALES, Defendant and Appellant.	G051142 (Super. Ct. No. 13WF3934) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Christopher Evans, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and reversed in part.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Sean

M. Rodriquez and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

This appeal arises from a petition to resentence pursuant to Proposition 47. It is presently on remand from the California Supreme Court. In our prior opinion, we held: (1) defendant was still serving his sentence while on post release community supervision (PRCS), with the result that the court must impose a new sentence under Penal Code section 1170.18, subdivision (b), rather than merely reclassifying the prior conviction under subdivision (f);[1] (2) defendant was entitled to credit his excess custody credits against the one year of parole imposed pursuant to section 1170.18; and (3) defendant was entitled to have any excess custody credits counted against his punitive fines. The California Supreme Court granted review as to the second holding and reversed our opinion, holding excess custody credits do not reduce the one-year parole period. (*People v. Morales* (2016) 63 Cal.4th 399, 403 (*Morales*).) It did not address either the first or third holding. It did, however, identify an additional twist. After our initial opinion, and prior to remand, the trial court attempted to comply with our opinion by crediting excess custody credits against defendant's parole period, resulting in the court discharging defendant from parole. (*Id.* at p. 409.) The Supreme Court left it to us to address any potential mootness issues on remand.

We asked for additional briefing on two issues: (1) Should the appeal be dismissed as moot because defendant was discharged from parole; and (2) Does the Supreme Court's rationale or holding have any application to the issue of whether excess custody credits can reduce applicable fines? Both parties responded. We conclude the appeal is not moot, and we reaffirm our prior holdings that a defendant on PRCS is

[1] All statutory references are to the Penal Code unless otherwise stated.

serving a sentence for purposes of resentencing under section 1170.18, subdivision (b), and that excess custody credits are applicable to reduce fines.

PROCEDURAL HISTORY

In March 2014, defendant pleaded guilty to felony possession of a controlled substance. In April 2014, he was sentenced to 16 months in state prison. In August 2014, he was released to PRCS for a period of three years. In November 2014, defendant filed a petition to have his sentence recalled and to have his felony conviction reclassified as a misdemeanor. The court recalled his sentence, imposed a jail sentence of time served, and imposed one year of parole.

DISCUSSION

The Appeal is Not Moot

We begin by addressing the mootness issue. The appeal is not moot because the order discharging defendant from parole was void. "[T]he trial court lacked jurisdiction to recall defendant's sentence and to resentence [him] pursuant to section 1170.18 while this appeal was pending." (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 929.) "[A]ny action taken by the trial court while the appeal is pending is null and void." (*Id.* at p. 923.) Accordingly, the court's actions did not render this appeal moot.

Proposition 47 and Section 1170.18

Proposition 47 reclassified certain drug- and theft-related offenses from felonies (or wobblers) to misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) The measure reduced "penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes." (Voter Information Guide, Gen. Elec. (Nov. 4,

2014) analysis of Prop. 47 by Legis. Analyst, p. 35.) As part of Proposition 47, the electorate enacted section 1170.18. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.)

Section 1170.18 applies to persons convicted of a reclassified offense prior to Proposition 47's effective date, and allows them to petition the court for reduction of the felony to a misdemeanor. The statute distinguishes between petitioners who are still *serving* a sentence and those who have *completed* a sentence.

A person "currently serving a sentence" for a felony conviction of a reclassified offense may petition for recall of the felony sentence under subdivision (a) of section 1170.18.[2] Under subdivision (b), the court must recall the felony sentence of a petitioner eligible under subdivision (a), and resentence the petitioner to a misdemeanor unless the court determines that doing so would unreasonably endanger the public. Under subdivision (d), a person resentenced "under subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole."

A person who has "completed his or her sentence" for a felony conviction of a reclassified offense may apply to have the conviction designated a misdemeanor under subdivision (f). Subdivision (f) does *not* provide for a period of parole.

Because Defendant was Still Serving a Sentence, the Court Properly Imposed Parole

Defendant contends the word "sentence," as used in subdivisions (a) and (f), means "prison term." He concludes he completed his "sentence" (within the meaning of subdivision (f)) before filing his section 1170.18 petition, even though he was still serving PRCS.

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[2] References to a statutory subdivision apply to section 1170.18 unless otherwise stated.

The word "sentence" — as used in subdivision (a) ("currently serving a sentence") and subdivision (f) ("completed his or her sentence") — is ambiguous. As defendant suggests, "sentence" might include only a defendant's prison term. On the other hand, "sentence" might encompass both the prison term *and* the corresponding period of parole or PRCS.

Because the word "sentence" in subdivisions (a) and (f) is ambiguous, we independently construe those subdivisions in light of (1) the statute as a whole, (2) the overall statutory scheme of which it is a part, and (3) the intent of the voters who enacted Proposition 47. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.)[3]

We first examine section 1170.18 as a whole. The statute uses the word "sentence" differently in subdivisions (a), (b), and (f) than in subdivision (d). In subdivisions (a), (b), and (f), "sentence" refers to a pre-Proposition 47 *felony* sentence. Subdivision (a) applies to a "person currently serving a sentence for a conviction . . . of a *felony or felonies*" (italics added), subdivision (b) provides for the recall of "the petitioner's *felony* sentence" (italics added), and subdivision (f) applies to a "person who has completed his or her sentence for a conviction . . . of a *felony or felonies* . . . ." (italics added). In contrast, subdivision (d) provides that a "resentenced" person "shall be subject to parole for one year following completion of his or her *sentence* . . . ." (italics added), thus referring to the new *misdemeanor* sentence to which the court has resentenced the person. Thus, the misdemeanor "sentence" in subdivision (d) includes only the jail term. But this does *not* answer the question of whether the determinate felony "sentence" in subdivisions (a) and (f) includes a prison term *and* a period of parol supervision or PRCS. Rather, section 1170.18, viewed as a whole, reinforces the reality that the word "sentence" is ambiguous and can be used in different ways.

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[3] Reviewing courts interpret statutes de novo (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562), including statutes added to the Penal Code by the passage of a ballot initiative (*People v. Park* (2013) 56 Cal.4th 782, 796).

We turn to the interpretative aid of the overall statutory scheme governing determinate felony sentences. Section 3000 expressly applies to such sentences, i.e., sentences "resulting in imprisonment in the state prison pursuant to Section 1168 or 1170 . . . ." (§ 3000, subd. (a)(1).) Section 3000, subdivision (a)(1) mandates that a determinate felony sentence "shall include" a period of parole supervision or PRCS. Section 1170, subdivision (c) recognizes this expansive scope of a determinate felony sentence, providing in relevant part: "The court shall state the reasons for its sentence choice [of the low, middle, or upper prison term] on the record at the time of sentencing. The court shall also inform the defendant that *as part of the sentence after expiration of the term* he or she may be on parole for a period as provided in Section 3000." (Italics added; see *In re Sosa* (1980) 102 Cal.App.3d 1002, 1105 [§ 1170 is part of "a comprehensive scheme to provide 'uniformity of sentences' for like offenses"].) These statutes are clear: a determinate felony sentence includes a prison term *and* a period of parole supervision or PRCS. Accordingly, a defendant subject to PRCS is serving a sentence for purposes of section 1170.18, subdivisions (a) and (b).

Excess Custody Credits Reduce Fines

Next we address whether our high court's holding in *Morales* has any impact on our prior holding that excess custody credits may be used to reduce fines. We conclude it does not.

Section 2900.5, subdivision (a), provides that excess credits "shall be credited . . . to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than one hundred twenty five dollars ($125) per day, or more, in the discretion of the court imposing the sentence."

In *Morales*, our Supreme Court held that credit for time served does not reduce the [subdivision (d)] parole period." (*Morales*, *supra*, 63 Cal.4th at p. 403.)[4] The high court interpreted subdivision (d) to *require* a one-year parole period subject to the court's discretion to order otherwise. (*Morales*, at pp. 403-404.) The court based its holding, inter alia, on subdivision (d)'s plain language (*Morales*, at p. 406); the Legislative Analyst's statement in the voter materials on Proposition 47 that resentenced offenders "'would be required to be on state parole for one year'" (*Morales*, at pp. 406-407); the court's conclusion that "the purpose behind [section 2900.5] is irrelevant to resentencing under Proposition 47" (*Morales*, at p. 406); and the court's reasoning that a contrary interpretation of subdivision (d) "would undermine the trial court's discretion in many cases" (*Morales*, at p. 405).

Section 1170.18, however, says nothing about fines, and thus, unlike the issue of parole, it does not supplant the legislative intent of section 2900.5 as it applies to fines. To the contrary, subdivision (m) states, "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant." Moreover, subdivision (d) states, "A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole." This language excludes parole from the application of custody credits, but nothing else. Because excess custody time cannot be credited against the parole period, if the amount of credits exceed the new

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[4] In *Morales*, the Attorney General's petition for review was "limited to the question of whether excess custody credits can reduce the period of parole" and "did not challenge the holding that excess custody credits can also reduce any fines." (*Morales, supra*, 63 Cal.4th at p. 404.)

sentence, the only type of excess custody credit available to resentenced persons is a credit against punitive assessments.[5]

DISPOSITION

The matter is remanded to the trial court with instructions to (1) vacate its void order discharging defendant from parole; and (2) apply defendant's excess custody credits against his eligible fines consistently with this opinion. In all other respects, the postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

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[5] Section 2900.5, subdivision (a) "does not apply to nonpunitive assessments." (3 Witkin & Epstein, Cal. Criminal Law (2016 supp.) Punishment § 464, p. 151.) For example, a court security fee (§ 1465.8) or criminal conviction assessment (Gov. Code, § 70373) is nonpunitive. (*People v. Alford* (2007) 42 Cal.4th 749, 759 [court security fee]; *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1492-1493 [criminal conviction assessment].) Section 2900.5 is inapplicable to them.

Section 2900.5, subdivision (a), also does not apply to restitution fines and orders. (See § 1205, subdivision (f).) Effective in 2014, the Legislature made section 2900.5, subdivision (a) consistent with section 1205, subdivision (f), by removing the reference to restitution fines in former section 2900.5, subdivision (a). (See Stats. 2013, ch. 59, § 7.)